person was before the court. The abuse of this power to imprison for contempts, and the injustice done, were very crying evils in the last century in England. But bearing in mind the possible dangers incident to all summary measures, it would seem that the dignity of the court might be upheld, and justice furthered, by a more frequent exercise by the courts of their privilege. The words of Lord Hardwicke have lost nothing of their force or meaning in the lapse of a hundred and fifty years: "Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the mind of the public against the persons concerned as parties in a cause before the cause is finally heard." If the infrequent use of this power in the past be urged against its application now, it may be answered that never before has the threatened substitution of trial by newspaper for trial by jury made such action so imperative.

MALICE — MALICIOUS CONSPIRACY. — The decision in the recent English case of *Temperton* v. *Russell et al.*, L. R. 1893, 1 Q. B. 715, in the Court of Appeal, is interesting in more than one way. By sustaining unanimously the verdict upon the first count, the Court of Appeal (Lord Esher, M. R., A. L. Smith, Lopes, L. JJ.) adds a third well-considered English decision to *Bowen* v. *Hall*, L. R. 6 Q. B. D. 333, and *Lumley* v. *Gye*, 2 E. & B. 216, in favor of the doctrine that malicious procurement of a breach of contract is an actionable tort. The court refused to accept the attempted distinction that those were and this was not a case of personal service, Lord Esher saying that *Bowen* v. *Hall* was "not a case of master and servant," and that the rule was general.

The case also helps towards definition of "malice" and of "malicious." Exactly what those words mean in this new form of action it has not been easy to say. The dictionary definition of malice as a morally evil desire to do injury (Worcester), puts to the law the too difficult question of what is and what is not morally evil. It would seem that here, as in the law of libel, the true meaning of the words must be "without lawful excuse;" since justifiable procuring of breaches of contract will not be actionable, however evil the motive, and mere lack of motive should not be a justification for procuring such breaches. In the case under consideration, Collins, J., charged the jury "that to induce a person who had made a contract with another to break it in order to hurt the person with whom it had been made, to hamper him in his trade, or to put undue pressure upon him, or to obtain an indirect advantage, was in point of law to do it maliciously; and that if the jury were satisfied that the defendants, or any of them, had induced persons to break contracts with the plaintiff, of the existence of which they were aware, and if their object in doing so was to injure the plaintiff in his trade in order to compel him to do something which he did not want to do, that would be 'maliciously' in point of law, and a cause of action would be established." This charge states several hypothetical cases applicable to the first count before the jury, in each of which the judge considered that there would be no lawful excuse, and in each one, from the point of view both of common honesty and of law, it would seem that a man has a right to protection for his contracts. The person who promotes and abets such a breach of faith should, unless he can show some justification, be liable equally with the principal.

The decision on the other count in *Temperton* v. *Russell* is open to more criticism. Collins, J., "directed the jury in substance that a malicious conspiracy to prevent persons from entering into contracts with another, if followed by damage to the person conspired against, was actionable;" and the Court of Appeal sustained this direction, citing on the point of conspiracy *Gregory* v. *Duke of Brunswick*, 6 M. & G. 205, 953, and *Mogul S. S. Co.* v. *McGregor, Gow, & Co. et al.*, 1892, A. C. 25. Upon examination of these cases it does not appear that either can be considered as authority for the decision. The first was a suit for a malicious conspiracy to hiss an actor. Shee, Serjt., for the plaintiff, made election, of his own accord, "to make out a case of conspiracy against both the defendants," and, failing, applied for a new trial on the ground that he might have had a verdict against one. This was rightly refused in an opinion carefully non-committal. Pollock (Torts, p. 268) considers that "the court were of opinion that in point of law the conspiracy was material only as evidence of malice." The second case decided that where the motive of a combination of steamship companies in offering unremunerative rates was to drive another company out of the business, and so secure monopoly, such conduct was not actionable at the suit of the competitor so injured, since "if neither the end contemplated . . . nor the means used . . . were contrary to law, the loss suffered by the appellants was *damnum sine injuriâ*" (Lord Watson). It is cited apparently for mere hints thrown out *obiter* by Lords Bramwell and Hannen, a small minority of the House then sitting, that there might be good reasons why a combination to do a legal act would be illegal. The fair statement of the previous English law is rather that of Sir Frederick Pollock (Torts, p. 267), that "it seems to be the better opinion that the conspiracy, or 'confederation,' is not in any case the gist of the action, but is only matter of inducement or evidence." *Temperton* v. *Russell* is new law upon conspiracy.

Farther than this, the same definition of "malicious" is used and approved in *Temperton* v. *Russell* concerning both counts, whereas the lawful excuses for persuading a man to do the legal act of refraining from a contract should on principle be infinitely more numerous than those for persuading a man to do the illegal act of breaking a contract. Lord Esher says (*Temperton* v. *Russell*, at p. 728) that this "seems rather a fine distinction." On the contrary, it is, or should be, a very plain and reasonable one. Here there is no procurement of a breach of contract, or of any civil wrong. The question is under what circumstances of motive the defendants were not justified in combining to use peaceful and legal means to persuade third persons not to enter into new relations of contract with the plaintiff. Referring back to the charge quoted above, we find it ruled that they may not do this "to obtain an indirect advantage." It is not, then, to be wondered at that the Law Quarterly Review (Vol. IX. p. 202) finds the case inconsistent with *Mogul S. S. Co.* v. *McGregor, Gow, & Co.*, for the persuasion and the results in that case were on principle the same as in this.

The unsettled state of American courts upon the subject is neatly indicated by the two recent cases in California and in Maryland, *Boyson* v. *Thorn*, 33 Pac. 492, and *Lucke* v. *Clothing Cutters &c. Assembly K. of L.*, 26 Atl. 505, the one *contra* to the decision on the first count in *Temperton* v. *Russell*, the other in accord with that on the second count.